Nos. 11,519 and 11,880

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

FRANK J. HENNESSY,
United States Attorney.
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
WILLIAM E. LICKING,
Assistant United States Attorney,
Post Office Building, San Francisco,
Attorneys for the United States.

Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

Nos. 11,519 and 11,880

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

UNITED STATES OF AMERICA,
Appellant,

vs.

ARROW STEVEDORING COMPANY (a corporation),
Appellee.

On Appeals from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

These are consolidated appeals from two final decrees entered by the United States District Court for the Northern District of California, Southern Division, dismissing petitions by the United States for recovery-over, in whole or in part, of any amounts for which the United States was liable to the libelants in

two separate libels brought against the United States under the Public Vessels Act, 1925 (46 U.S.C. 781 *et seq.*), by an injured longshoreman and the personal representative of a deceased longshoreman to recover damages for injury and death, respectively, in consequence of an accident on board a Navy vessel.

In No. 11,519, the Williams case, the decree of the United States District Court for the Northern District of California was entered August 30, 1946 (Wms. R. 60).[1] Notice of appeal was filed November 15, 1946 (Wms. R. 61) and the appeal allowed December 16, 1946 (Wms. R. 63). In No. 11,880, the Mitchell case, the decree of the United States District Court for the Northern District of California was entered August 19, 1947 (Mchl. R. 35). Petition for appeal was filed November 14, 1947, and allowed the same day (Mchl. R. 37-38). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (as revised 28 U.S.C. 1291).

QUESTION PRESENTED.

Appellee Arrow Stevedoring Company contracted with the Navy to load and unload its vessels. The contract provided that Arrow would carry workmen's compensation and public liability insurance policies which should waive all rights of subrogation against the United States. The contract further provided that

---

[1]Hereinafter the record in the Williams case is identified by the abbreviation "Wms. R." and that in the Mitchell case by "Mchl. R."

Arrow should remove and replace hatches without cost to the Government, but the actual practice was for the ship's crew to open and close the hatches. Arrow's night supervisor asked the ship's officers to open a certain hatch. They declined to do so because there were not sufficient crew aboard for the job. Arrow's night supervisor thereupon had his own men open the hatch. Arrow's men were unable to fasten the cover safely in the open position and Arrow's night supervisor either did not tell the ship's officers of the dangerous condition he had created or agreed with them that the stevedores would not work the hatch until the ship's personnel could fix it sometime next morning. But Arrow's day supervisor and day hatch boss, without any inquiry or investigation, sent their men to work in the hatch. The men had just begun to work cargo in that hatch when the cover fell, injuring one man and killing another. Compensation payments were made without award in both cases and the injured employee and the personal representative of the dead employee recovered separate judgments in their own names against the United States as the operator of the vessel. The judgment in favor of the injured employee gave Arrow an express lien for the amount of the medical expenses and compensation which it had paid him; that in favor of the representative of the dead employee did not.

The question presented here is whether in such circumstances Arrow is liable-over to the United States for the amount of such judgments or any part thereof.

STATEMENT.

The pleadings.

To recover for injuries and death in consequence of an accident aboard the *USS Edgecombe* on May 28, 1945, libels were brought against the United States by Percy L. Williams (Wms. R. 2-10) and Edgar E. Reite, as Administrator of the estate of John Henry Mitchell, deceased (Mchl. R. 2-7), alleging that the injury and death involved had resulted from the negligence of the United States. While working in No. 4 port hatch on the vessel, Williams and Mitchell were struck by a falling hatch cover in circumstances hereafter described. Although the libels did not so allege, at the time such injury and death occurred Arrow Stevedoring Company, the employer of Williams and Mitchell, was engaged under a general stevedoring contract with the United States in unloading the *USS Edgecombe,* a public vessel of the United States Navy.

The United States filed answers (Wms. R. 12-17, Mchl. R. 8-12) and impleaded Arrow Stevedoring Company, the appellee in this Court, under Admiralty Rule 56 (Wms. R. 18-21, Mchl. R. 13-16). These answers and impleading petitions denied fault or negligence on the part of the Government and alleged that if any there was, it was that of Arrow, and that by reason of the duties which Arrow had undertaken and the terms of its contract, the United States was entitled to recovery-over, in whole or in part, for any liability imposed upon the Government in favor of the libelants. The answers of Arrow (Wms. R. 30-35,

Mchl. R. 17-22) denied fault or negligence and as an affirmative defense alleged that it had already furnished medical care and made payments pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of the value of $1855.49 to Williams and of $1282.41 to the heirs at law of Mitchell.

The stevedoring contract.

Arrow's contract with the United States contained, among others, the following Navy standard form clauses in respect of opening and closing hatches and of liability, indemnity and insurance (Wms. R. 265, 268-269) :[2]

Article 6. Opening and Closing Vessel.

> Without cost to the Government, Contractor shall remove and replace wedges, hatch bars, tarpaulins, hatches and beams with respect to all decks, both during loading or discharging operations and to make the hatches ready for sea. Stevedoring Contractors are required to cover all hatches at their own expense if not working at night.

* * * * * * *

Article 21. Liability and Indemnity.

> (a) The Contractor shall procure and maintain at all times during the continuance of this

[2]There appears to be some confusion and duplication in the record in respect of the numbering of the clauses in question. This stems from the fact that the contract document included a number of amendments in the course of which the clauses respecting liability, indemnity and insurance were repeated. It is not believed that the minor variations in punctuation are material, since the clauses were obviously intended to be the same.

agreement a policy or policies of insurance with underwriters to be approved by the Contracting Officer insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than $250,000.00 in any one accident, and for property damage occasioned to any pier, car, lighter, vessel, cargo or other property to an amount not less than $250,000.00 in any one accident arising out of any operations performed hereunder.

(b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, [195] subject, however, to the following limitations and conditions:

(1) Contractor's liability to the Government shall be limited to the sum of $250,000.00 for loss or damage in connection with any single catastrophe, accident or occurrence in the event that any such catastrophe, accident or occurrence and such loss or damage shall arise from or be in any way attributable to or connected with the presence or proximity of ammunition, explosives, gasoline or other inherently dangerous cargoes or the loading, discharging or handling of such cargo by the Contractor.

(2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government, or resulting from compliance by officers, agents, or employees of the Contractor

with specific directions of the Port Director, NTS, 12th Naval District. Nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships or other gear supplied by the Government.

* * * * * * *

(4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said [194] loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

The case of the libelants against the United States.

The facts respecting the occurrence of the accident and the liability of the United States to the libelants, as distinct from the cause of the accident and the liability between the United States and appellee Arrow, are substantially undisputed and may be summarized from the findings filed by the Court below. Williams and Mitchell, together with four other longshoremen employed by Arrow, were working on the *Edgecombe* at the level of the third deck in No. 4

port hatch;[3] they came aboard about 7:00 a.m., at the beginning of the day shift, and went below to the hatch's lower compartment for the purpose of unloading boxes of empty ammunition shells which completely filled the compartment (Wms. R. 37, Mchl. R. 24). The port and starboard lower compartments of No. 4 each had a square hatch cover about eight feet wide, measured athwartship, by about fourteen feet long, measured fore and aft; each of these covers weighed about 3500 pounds and was hinged on its inboard side along the center line of the vessel (Wms. R. 37-38, Mchl. R. 24-25). In order to provide a means of securing the hatch covers in the open or vertical position and preventing them from falling shut while cargo was being worked, two pawls or dogs, roughly in the shape of a hook, were fitted to hold the upper corners of each cover; one dog of each pair was attached to the forward bulkhead of the hatch, the other to the aft bulkhead; each dog swung on a shaft extending in a fore and aft direction from the bulkhead; when the cover was in the open or vertical position, each dog was intended to swing down upon the upturned edge of the cover, so as to extend over and beyond the edge and down a few inches from the top, thereby gripping the edge and holding the cover from falling shut; for a locking device, to prevent the dog from raising and releasing its grip on the hatch cover, there was a hole in each dog through which a metal

[3]It appears from the testimony generally that No. 4 hatch had a "trunk" or "well" somewhat "like an elevator shaft" from the weather deck to the level of the third deck, with no intervening cargo compartments until the hatch covers of these lower compartments were reached.

locking pin was supposed to be inserted into a corresponding hole in the bulkhead; these locking pins were supposed to be attached to the bulkhead near the holes by means of chains (Wms. R. 38, Mchl. R. 25). The dogs and locking pins were at a height beyond the reach of persons standing on the deck and no convenient means was provided for putting the dogs and locking pins in place to hold the hatch covers and it was the custom on the *Edgecombe* and other Navy vessels for the Navy crew to open and secure the hatch covers at the request of the stevedores (Wms. R. 40-41, Mchl. R. 27-28).

When Arrow's day gang began work on No. 4 hatch, both hatch covers were already raised and standing in a vertical position upon their hinges; Williams, Mitchell and another member of the gang stood on top of the cargo ready to commence work and a cargo board was lowered to them; the cargo board was carefully lowered through the hatch by means of falls from a winch and booms and neither it nor the falls struck the hatch cover; after the cargo board had come to rest on top of the cargo, the hatch cover suddenly fell shut and before Williams and Mitchell could jump aside they were crushed (Wms. R. 37-38, Mchl. R. 25).

The Court below found as factual conclusions that at the time of the accident the vessel was "in the control of the United States Navy" which was negligent "in not taking proper and reasonable precautions to secure said hatch cover so it would not fall" and that the fall of the hatch cover and the injury and death resulting therefrom were the consequence of

the defective and unseaworthy condition of the vessel (Wms. R. 41, 42, Mchl. R. 27, 28). As conclusions of law the Court stated that the vessel was unseaworthy, that the United States was negligent, while libelant Williams and libelant's decedent Mitchell were not negligent (Wms. R. 48, Mchl. R. 33-34). It assessed damages at $9259.50 in Williams' case (Wms. R. 49) and at $18,000.00 in Mitchell's case (Mchl. R. 34).

The testimony in the Government's case against Arrow.

The foregoing facts, as found by the Court below, establish the liability of the United States to the libelants for breach of its non-delegable duties as operator of the *USS Edgecombe* to furnish a seaworthy vessel and to exercise due care to provide a safe place of employment for the longshoremen working aboard regardless of whether the employees of the United States or those of appellee Arrow, its stevedoring contractor, were responsible for the negligent manner in which the hatch that fell and injured libelants was opened without being properly fastened and secured. Accordingly, the United States does not deny liability to libelants as found by the Court below and does not prosecute an appeal as against them.[4] But in respect

[4]Because the decree in favor of Williams contains a declaration of lien thereon in favor of Arrow to the extent of $1,855.49 on account of compensation payments (Wms. R. 60), an appeal was originally taken as to libelant Williams as well as Arrow. This was later dismissed in the hope that counsel would stipulate to permit payment to Williams of the net amount to which he is beneficially entitled with reservation of the rights of Arrow and the United States *intersese* pending the outcome of this appeal. Counsel have refused so to stipulate, however, and continue to prevent the United States from paying Williams.

of the question of whose employees proximately caused the place of employment to be unsafe, the findings and conclusions of the Court below are contested on this appeal and, accordingly, the testimony on that point will be summarized for the convenience of the Court.

In the *Williams* case testimony concerning the opening of the hatches was given by Claude Bowers, Arrow's night walking boss, who was ship supervisor for the stevedores when the hatches were opened; by Alf Larsen, Arrow's day hatch boss, who had charge of the stevedore gang at No. 4 hatch when the accident occurred; and by Herbert Carnes, boatswain's mate, second class, on the *Edgecombe,* who had charge of No. 4 hatch. In the *Williams* case it was stipulated that the Court should consider the transcript of testimony taken in the *Williams* case and hear certain further testimony. This additional testimony was that of Martin O'Shea, Arrow's day walking boss, who was ship supervisor for the stevedores at the time of the accident, Claude Bowers, Arrow's night walking boss, who was recalled to give further testimony, and Kasimir Anzulovich and Joseph Kokicks, Arrow's employees who actually opened the No. 4 port hatch cover.

Claude Bowers, Arrow's night walking boss, was called as a witness for the Government in the *Williams* case (Wms. R. 276-305). He testified that he had been a stevedore for twenty-five years and the night of May 27-28, 1945, preceding the accident, was ship supervisor for the stevedores on the *USS Edgecombe* (276, 278). Bowers had charge of the various fore-

men or hatch bosses and their gangs working that ship (277, 287, 293). The night shift was from 7:00 p.m. until 6:00 a.m. and the day shift from 7:00 a.m. to 6:00 p. m. (278). In the course of his duty as walking boss he remained during the hour between the gang change to supervise and to show the day walking boss what was being done (278, 287).

When Bowers began the night shift, the gang working No. 4 hatch were just starting to unload the empty shell cases which were in the trunk or well of the hatch which extended like an elevator shaft from the top deck to the hatch covers of the lower compartment at the bottom (278-280, 288).

About midnight, Bowers testified, he spoke to the officer of the desk, asking him "to rig the gear for the offshore [or port] tank because the cover was not in proper position" (281, 283, 290-291). The officer refused on the ground that he did not have enough men available until morning (283-284, 291). Bowers and the officer ultimately agreed that the stevedores would work only the starboard or inshore hatch and the port hatch would be rigged sometime during the morning when ship's personnel were available (284, 304). The work of unloading the trunk of the hatch continued until about 2:00 a.m., when it was finally clear and the hatch covers of the lower compartments exposed (280-281).

When the covers were exposed, Bowers said, he had the hatch boss and his gang open the hatch covers in his own presence and under his direction (285, 293-294, 299). They followed the usual practice and

opened the starboard and port covers at the same time, beginning with the port side (292, 294, 301). They hauled up the covers with the ship's gear and, by means of one man lifting up another, put the dogs or hooks down over the covers (294, 301-302).

The port cover, Bowers testified, looked to be in a safe condition (294-295, 297). But in fact the locking pins were not fitted into place because the pin for the forward hook was bent, while the pin for the after dog was not found (296, 302-303). Bowers testified categorically, "That is why we didn't work in the hatch" (296).

Bowers testified he did not report this condition of the hatch cover to the officer of the deck (296). In any case, he stated, with the ship's gear rigged as it was, it would have been dangerous to work the port hatch and, knowing this, the night gang did no work there (296-297). The ship's gear was already rigged in proper shape for them to work the starboard or inshore hatch safely (284-285). The stevedores continued to work the starboard hatch throughout the night, but there was still cargo in that hatch when they finished the shift (284-285, 288, 291-292).

When the night gang quit and the day gang started work, the port hatch cover, Bowers testified, was still open (286-287). No cargo was removed from the port side and when the night gang left, that hatch was still completely full (288-289, 304).

Alf Larsen, Arrow's day hatch boss, was called as a witness by the libelant in the *Williams* case (Wms.

R. 155-186). He testified that he had been a stevedore since 1906 and on the day of the accident was foreman of a gang of sixteen men (156). He and his gang had been working on the *Edgecombe* for about two days before that morning, but they had not worked No. 4 hatch (157). About 4:00 p.m., the day before the accident, while working in the vicinity of No. 5 hatch, one of the ship's petty officers asked Larsen if No. 4 hatch was to be worked that night (159-160, 161, 162). He replied, "I suppose they will, but you had better go and see the walking boss" (163).

When Larsen came aboard the morning of the accident, he said, he went up on the top deck; No. 4 hatch was opened up and he "looked down in the hatch and everything seemed safe to me" (163, 164). There was no cargo in the trunk of the hatch between the top deck and the covers of the lower compartment which was open, but on the port side no cargo had been removed and it was filled to within six or eight inches of the top with empty shells (165-166). His men did not raise the cover; it was already up when they got there (168).

When he and his gang began work at 7:00 a.m., six men went below deck, Larsen testified, while three men and himself stayed on deck and the rest of the gang were on the dock (156). A four-by-six-foot cargo scow was carefully lowered into the port hatch, which was about eight to ten feet wide by about twelve feet long, without striking anything; it came to rest on the edge of the hatch (166).

Larsen was on the top deck in the after end of the hatch and a few minutes after the scow was let down, he saw the hook on the forward end of the hatch cover slip and work up and down (167-168). He yelled, "Look out," but the cover took only seconds to fall; three men jumped clear but three were caught underneath (168-169). After the cover was raised again and the two covers lashed together, Larsen testified, he looked at the after hook and saw it was bent (169-170). He did not examine the locking pins of the dogs and did not know their condition or whether there was a pin for the forward hook or dog (179-183).

Larsen testified that in his opinion the bent hook could not hold the cover; "as a rule you secure the two tank tops together" (171). The cover itself was in good condition; "there was nothing defective about the cover; whether the fastening was defective or there was carelessness" he did not know (173). He admitted on cross-examination that when he sent his gang down the hatch he did not know whether or not there was anything holding the hatch cover except the one forward hook and did not know whether it had any locking device (185-186, 183, 185).

Herbert Carnes, boatswain's mate, second class, in charge of No. 4 hatch on the USS Edgecombe, was called as a witness for the Government in the *Williams* case (Wms. R. 205-275). He testified that he had eight men under him and was in complete charge of all men and all work in the area of No. 4 hatch as far as concerned the activities of the Navy crew

in rigging and moving booms, changing cargo gear and checking all rigging for working cargo (209, 208, 222). He was on duty the day of the accident and no other non-commissioned officer had any authority over men working around No. 4 hatch so long as he was aboard and no orders from any superior officer concerning opening the hatch could be given except by going through him (209, 215, 264).

About 4:00 or 4:30 p.m., Carnes testified, he either learned for himself or was told by the Chief Petty Officer to take the hatch cover off No. 4 hatch on the top deck (212-213). Before their quitting time for the day, Carnes and his men had uncovered the hatch on the upper deck and raised the booms so the stevedores could unload the cargo stowed in the top of the hatch (213, 218). Before he knocked off his men he went to check with the stevedore boss about whether they wanted him to have his crew open the lower hatch when the stevedores finished getting out the cargo on top of the lower hatches (209-210, 213-214).

Carnes spoke to a stevedore who, he said, appeared to be a foreman and acted and was dressed "like one of the boss men around there" (209-210, 214). Carnes testified that he asked if he could keep the Navy crew "on deck" so that when the stevedores "finished unloading the cargo that was in the hatch we could open the hatch on the lower deck," but that the man said no, "that they would get to it when they got the cargo unloaded" (217-218, 221). Carnes had half his crew sleeping aboard and available to be turned

out if there was any rigging which had to be done during the night (249-250).

After he had knocked off his men, Carnes said, he went to dinner and about 9:00 p.m. went up to a small room or locker near No. 4 hatch where he slept, waking off and on through the night and hearing cargo being worked in the starboard side of No. 4 hatch (219-220, 227). About 6:30 the next morning Carnes had breakfast, returned to the locker around 7:00, and shortly after heard the hatch cover fall (227-228). He started below and met the ship's commander who told him to get the hatch open as soon as possible (228). When Carnes got down to the lower hatch, the cover was just being lifted by the stevedores and he went back up (239, 259).

When he got back up on the main deck, Carnes found the stevedores had already opened the hatch; he saw that they had the forward hook or dog on the hatch cover, but the after dog was not down over the edge of the cover (228, 261). Carnes therefore sent one of his men down to put the pin in the forward hook and put the after dog on the cover (228). While the man was down there putting the pin in the forward dog, the ship's executive officer looked down and called out to put a turnbuckle from one cover to the other (229).

There were turnbuckles and rigging right by the covers, Carnes said, for the man to put on the turnbuckle (229). Meanwhile Carnes had another of his men take the winch and put a slight strain on the

cover and the man below then put the aft dog over, put the pin through it and then came back topside (229, 260-262). Carnes was present when the hatch cover was raised after the accident and later when it was closed; he had been present when the cargo of empty shells which was being discharged had been loaded and the hatches closed; at all these times both dogs and both locking pins were there in place and the cover was not warped or distorted (234-237).

Martin O'Shea, Arrow's day walking boss, was called by the Government at the trial of the *Mitchell* case for the purpose of corroborating the testimony in the *Williams* case (Mchl. R. 98-107). He testified that as day walking boss he usually got down about 6:15 a.m.; the night walking boss would show him around, tell him about what hatch was being worked, then when the day gang comes on, at 7:00 a.m., he calls them in (104).

When he came on the job the morning of the accident, O'Shea testified, he saw Bowers, the night walking boss; Bowers did not say a word about the No. 4 hatch where the accident later happened (98-99). O'Shea looked in No. 4, saw the "side ports" or lower hatch covers were up, "and I presumed it was safe to work" because (99)—

> "Well, you understand, any time those things is lifted up they are supposed to be safe. Otherwise they won't be up. They are supposed to be secured."

O'Shea made no personal examination of the hatch cover to see whether it was safe and Bowers didn't

say anything about its not being safe nor that he had opened it during the night (100). He made no personal examination, O'Shea said, because (101),

> "They worked in that hatch all night, so why should I make an examination? It was up. The port side was up already. * * * It is always safe when it is up and it is secured. The Navy never opens those things up unless they make it secure and safe."

Although he didn't know whether the Navy opened it, O'Shea testified, he "presumed they opened it"; it was open in the morning when he came on (101). In not inspecting, he relied upon what is proper stevedoring practice, that the hatches being raised had been secured by whoever raised them (106). O'Shea explained, "When they are up they're secured, they are supposed to be able to work them without any danger to anybody" and he relied on that (102-103).

Claude Bowers, Arrow's night walking boss, who had already testified in the *Williams* case, was called a second time by the Government to testify in the *Mitchell* case. Bowers reiterated that as night walking boss, in order to communicate to the day shift the condition of the work, he was required to be on the ship before and after the night shift men who worked from 7:00 p.m. to 6:00 a.m. (45-47).

Bowers stated that when the day shift came on the morning of the accident he reported to O'Shea, the day walking boss, that the holding device for the hatch cover was defective; he said (55-56), "I told

him that the pin was sprung on the top, and they would have to see the Navy to get that fixed before they started operating in that hatch."

His conversation with O'Shea about the condition of the hooks and pins of No. 4 port hatch cover took place, Bowers said, "about twenty minutes after six, I guess, on that hatch" (56). Bowers testified (81), "I told him one of them was sprung; he couldn't get it in place properly." He also told O'Shea that the other pin was missing (81).

Bowers confirmed his testimony in the *Williams* case that although the port hatch cover appeared safe when looked at from the top deck, when looked at from the deck below it could be seen that the cover was actually not safe because the hook or dog was bent and the pins were not there (56, 57, 58, 62, 67, 86). It appeared safe, he said, "If you just looked at it" (71). But he "wouldn't go in there until it was fixed" (76). After the accident, when the hatch covers were lashed together, the stevedores paid no further attention to the dogs or hooks and he could not state whether they were fixed or not (73, 76).

Bowers stated he was given no instructions as to how to secure the hatch doors (59). His men just pulled them open with the ship's gear and put the hooks over the covers by one man lifting another up so that he could reach it (62-63). His men opened the hatch about 1:30 a.m., at which time one of the hooks or dogs, which hold the open cover in place on the port side, was sprung and one of the locking pins was bent, while the other was not found (48-49).

Bowers testified that they raised both port and starboard covers at the same time but didn't work the port side because the cargo gear was not trimmed right. (53). The condition of the hooks and pins on the port cover was called to his attention right away (50).

Bowers changed his testimony from that given at the *Williams* trial as to whether he told the officer of the deck about the hooks on the port hatch cover. When he went to the officer of the deck about rigging the booms so both sides of the hatch could be worked, Bowers said he also reported the condition of the bent dog and pin (55, 59). The officer said he would have it fixed in the morning as soon as he had the men available; "he didn't say what time, as soon as he had the men available" (55, 59).

Bowers stated that he told the officer of the deck that he would leave the port side hatch altogether and work on the other side; the officer responded, "All right" (59). Thereafter the stevedores continued to work on the other side and did not work on the port side (55).

Kasimir Anzulovich and Joseph Kokicks, Arrow's employees who opened the lower hatch covers, were also called in the *Mitchell* case (Mchl. R. 89-97) to corroborate the testimony already taken in the *Williams* case. Both men testified that they had worked on the night shift as members of the gang which opened No. 4 lower hatch on the *Edgecombe* (89-90, 93-94).

Anzulovich stated that he saw no Navy personnel around; he saw the two hooks to fasten the covers

open, but saw no locking pins; he lifted up another stevedore and the latter dropped the hooks down over the hatch covers (90, 92). The stevedores worked in cargo on the port side of the lower hatch, but when they left the ship at the end of the shift both hatch doors were still standing open the same way as when they opened them (92-93). He saw no Navy personnel around at any time while he was working there (93). When he came to work the evening after the accident the hatch covers were lashed together (91). He said if that had been done before there would have been no accident (92-93)—

> "I don't know who was supposed to do it. If I was a foreman I would do it myself, even if the Navy wasn't there, for safety first."

Kokicks testified that sometime after midnight he and the rest of the gang "hooked on the winches" and lifted the doors (94). When raised and open they were fastened by a big dog over the edge of the cover (94). He did not see any locking pins although he put the hooks on himself, "Just slapped them on" (95).

The Court's findings and decision in the Government's case against Arrow.

In neither case did the District Judge himself make findings of fact and conclusions of law. In each case the findings and conclusions proposed by successful counsel were adopted bodily by the Court (Wms. R. 36-49, Mchl. R. 23-34). Indeed, in the *Mitchell* case they appear in the record with the caption "Im-

pleaded Respondent's Proposed Findings of Fact and Conclusions of Law and Decree" (Mchl. R. 23).

These findings signed by the Court may be condensed as follows: Arrow neither knew nor had reason to expect the defective condition which existed in the hooks and locking pins for the hatch cover; it was the custom and duty of the Navy crew to open and fasten the hatch cover and the Navy crew opened, raised and secured the hatch cover and "failed to use reasonable care in fastening said hatch cover, and failed to fasten it securely and safely so as to prevent its falling" (Wms. R. 40, fng. 14, 41, fng. 17, 42, fng. 22; Mchl. R. 24, fng. 6, 28-29; fng. 16, 21). Arrow was not guilty of any negligence proximately causing or contributing to the accident, the injuries and damage "resulted from default of ship and gear supplied by the respondent United States" (Wms. R. 45-46, Mchl. R. 30, 32).

The Court concluded as a matter of law (Wms. R. 48-49, Mchl. R. 33-34) that the respondent-impleaded Arrow was not negligent (Wms. Concl. 5, Mchl. Concl. 5) and that "The fall of the hatch cover and the libelant's [decedent's] injuries were proximately caused by the defective and unseaworthy condition of said vessel in respect to the means for securing said hatch cover and by the negligence of the United States" (Wms. Concl. 6, Mchl. Concl. 6). Decrees were accordingly entered in each case dismissing on the merits the Government's impleading petitions against Arrow. This appeal followed.

SPECIFICATION OF ERROR.

The District Court erred:

1. In holding that appellee Arrow Stevedoring Company and its employees were not negligent.

2. In failing to hold that the employees of appellee Arrow Stevedoring Company were negligent.

3. In holding that the fall of the hatch cover and the injuries resulting therefrom were proximately caused by the negligence of the United States.

4. In failing to hold that the negligence of appellee Arrow Stevedoring Company and its employees was the proximate cause of the falling of the hatch cover and the injuries resulting therefrom.

5. In holding that appellee Arrow Stevedoring Company is not liable to the United States for any part of the loss or damage.

6. In failing to hold that the United States is entitled to recovery-over against Arrow Stevedoring Company for the loss or damage.

7. In dismissing the impleading petitions of the United States against Arrow Stevedoring Company.

ARGUMENT.

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE NEGLIGENCE OF ARROW IN SENDING ITS MEN TO WORK UNDERNEATH AN INSUFFICIENTLY SECURED HATCH COVER.

The review of the testimony concerning the opening of the hatch covers (*supra* pp. 8-9) shows conclusively that Arrow's night shift stevedores opened No. 4 lower hatch cover on both the port and starboard sides and that they were fully aware that they had not been able to secure it safely in the open position so as to insure that it would not fall and injure any men who might work beneath it. While the testimony conflicts as to whether Arrow's night walking boss reported the condition to the day walking boss who relieved him, there is no doubt as to the knowledge and responsibility of Arrow. Similarly, it is unimportant whether Arrow's night walking boss did not report to the Navy lieutenant who was officer of the deck the dangerous condition in which the stevedores left the open hatch cover or whether he did make such a report. The testimony is plain that if he did so report it, he further reached an understanding with the officer of the deck that the stevedores would work only in the starboard hatch and that no work would be done in the port hatch, where the injury occurred, until after the dangerous condition had been corrected sometime during the following morning. In these circumstances, it appears indisputably from the record that Arrow's employees had complete charge of the hatch, with full knowledge of the dangerous condition complained of, and had assured the ship's per-

sonnel that no work involving exposing the stevedores to the dangerous condition would be done. It is thus plain that the sole proximate cause of the falling of the hatch cover and the resulting injury and death was the negligence of Arrow's foremen in permitting the stevedores to work in the lower No. 4 port hatch after having agreed with the ship's officers that they would not do so.

1. The findings of negligence signed by the District Court are clearly erroneous and should be disregarded.

In the cases now at bar the judges who heard the evidence did not themselves make findings of fact and conclusions of law as required by Admiralty Rule 46½. The indefinite and argumentative documents which appear in the record as findings and conclusions are the work of counsel successful in the District Court. It is clear from a comparison of the findings as signed at counsel's request in the *Williams* case (Wms. R. 36-49) with the requested modifications by the Government (Wms. R. 49-59) that the trial judge omitted to exercise his independent judgment in any respect whatsoever. Indeed, in the *Mitchell* case the findings and conclusions appear in the record (Mchl. R. 23-34) with the heading, "Impleaded Respondent's Proposed Findings of Fact and Conclusions of Law and Decree."

It is elementary that where the trial judge does not make findings of his own, using the proposals of counsel for both parties as a guide to assist him in reaching his own decision, but merely accepts the findings

prepared by successful counsel, the Appellate Court should not treat such purported findings as entitled to the weight given findings made by the trial judge himself. E.g. *The Severance,* (4th Cir., 1945) 152 F. (2d) 916, 918, collecting cases.

Moreover, findings concerning negligence such as are here in question are not findings of fact in the true sense so as to be binding unless clearly erroneous. They are mere factual conclusions respecting a standard of conduct and are reviewable as a matter of law. *Great Atlantic & Pacific Tea Co. v. Brasileiro,* (2d Cir., 1947) 159 F. (2d) 661, 665; *Hutchinson v. Dickie,* (6th Cir., 1947) 162 F. (2d) 103, 106; see *Johnson v. Kosmos Portland Cement Co.,* (6th Cir., 1933) 64 F. (2d) 193, 195.

But in any event we believe that, as shown hereafter, the purported findings found in the records now at bar are clearly erroneous and contrary to the evidence insofar as they purport to hold that the employees of Arrow were free from any negligence which caused the injury of Williams and Mitchell, but that, instead, it was the United States which was negligent.

2. Arrow was negligent in sending its men to work under the hatch cover when it had knowledge of the dangerous condition prevailing.

The testimony on the *Williams* trial establishes beyond any shadow of doubt that Bowers, Arrow's night walking boss, and his men who opened No. 4 lower hatch, knew that the port hatch cover had not been safely secured by the stevedores. In such circum-

stances it was Bowers' duty to explain and point out the dangerous condition of the cover to the day walking boss who relieved him.

Indeed, as night walking boss, Bowers was required to remain during the hour between 6:00 and 7:00 a.m. for this very purpose. The silence of the record of the *Williams* trial as to whether or not Bowers did in fact point out the dangerous condition to O'Shea, Arrow's day walking boss, is entirely immaterial insofar as regards Arrow's responsibility. Arrow is charged with Bowers' knowledge and his failure to report the situation to O'Shea does not excuse Arrow.

For the same reason the conflict in the additional testimony received at the *Mitchell* trial cannot affect the result. That Bowers testified that he had told O'Shea about the dangerous condition of No. 4 port hatch cover, while O'Shea testified that Bowers had not, cannot alter the fact that Arrow is responsible for the knowledge which it gained through Bowers, its night walking boss, even though he failed in the performance of his duty to Arrow in communicating such knowledge to O'Shea, its day walking boss.

It seems plain, moreover, that even if Bowers' testimony is totally disregarded, still the testimony of Arrow's day gang boss Larsen at the Williams trial and Arrow's day walking boss O'Shea at the *Mitchell* trial is plain that Arrow is chargeable with their negligence in failing to make any inspection whatsoever with a view to ascertaining whether or not the hatch cover was in a safe condition before they sent their men to work beneath it.

It is well established that the stevedore contractor owes a duty to inspect the ship's appliances in order to ascertain whether or not they are in safe condition for the stevedores to make use of them. *Vanderlinden v. Lorentzen,* (2d Cir., 1944) 139 F. (2d) 995; *Grillo v. Royal Norwegian Government,* (2d Cir., 1943) 139 F. (2d) 237; *The Thomas P. Beal,* (W. D. Wash., 1924) 295 Fed. 877, 880; *The Jethou,* (D. Ore., 1924) 2 F. (2d) 286. And Arrow assumed an obligation to the United States to perform that duty by reason of its contractual undertaking to load and unload the vessel in a proper and workmanlike manner.

3. The United States was entitled to rely on Arrow's performing its duty not to expose its employees to known dangerous conditions on the ship.

The evidence is plain that the United States was so situated as to be entitled to rely on Arrow's performance of its duty to protect its men. This is so whether we accept Bowers' testimony at the *Williams* trial that he did not advise the officer of the deck of the fact that Arrow's men had been unable to safely secure No. 4 port hatch cover, or accept his testimony at the *Mitchell* trial that he did tell the officer of the deck of the unsafe condition but agreed with the latter that the stevedores would do no work in the port hatch until the ship's gear could be re-rigged and the cover properly secured sometime next morning.

In either event the United States had no reason to believe that Arrow would thus needlessly expose its men to a known danger. It was entitled to assume that once Arrow knew of the dangerous condition

existing, it would not allow its men to work where they were exposed to the danger of the hatch cover falling until there was reason to believe that the ship's personnel had corrected the condition of the cover so that the danger no longer existed. As this Court observed in *Seaboard Stevedoring Corp. v. Sagadahoc SS. Co.,* (9th Cir., 1929) 32 F. (2d) 886, 887, "We are aware of no rule under which the ship's officers should be required for appellant's [stevedore's] benefit to exercise a high degree of vigilance to see that it performs a plain duty." As the Court observed in *Cornec v. Baltimore & O. RR. Co.,* (4th Cir., 1931) 48 F. (2d) 497, 502, the stevedore owes to the vessel and her owners the duty of using due care; the latter owe no such duty to the stevedore.

When it is thus established that appellee Arrow owed a contractual duty to the United States to exercise due care not to expose its stevedores to the dangerous condition, the burden was upon it to show why it failed to do so. *Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.,* (2d Cir., 1922) 281 Fed. 97, 109. This burden Arrow made no attempt, in the Court below, to sustain. The testimony of any of its employees was elicited solely as a result of certain of them having been called by libelant and the Government. Arrow itself compelled the other parties to call its people as adverse witnesses. For its own part, it called none of them and if the record is wanting in definiteness in respect of what action was taken by the stevedores to apprise the officers of the ship of the dangerous condition of the lower No. 4 port

hatch cover in the state in which they left it when they opened the hatch, it must be assumed that this is because Arrow knew such testimony would be unfavorable to it. *The New York,* (1899) 175 U. S. 187, 204; *The Bolton Castle,* (1st Cir., 1918) 250 Fed. 403, 406; *The Eastchester,* (2d Cir., 1927) 20 F. (2d) 357, 358; *Barrett v. City of New York,* (S.D. N.Y., 1947), 73 F. Supp. 832.

4. The failure of the United States to maintain a seaworthy locking device on the hatch cover was not the proximate cause of the accident.

That libelants were entitled to recover from the United States, because of a breach of its non-delegable duty to furnish a seaworthy ship with a proper locking device on the hatch cover and to exercise due care to furnish libelants a safe place in which to work and that the Government could not defend on the ground that it had made a contract with Arrow to unload the vessel in a proper and workmanlike manner, will not serve to relieve Arrow from liability-over to the United States for breach of such contractual duty. On the testimony which we have summarized (*supra* pp. 19-22) there can be no doubt that the negligence of Arrow in sending its men to work in the hatch underneath the improperly secured hatch cover was the intervening and sole proximate cause of the damage and loss involved.

The principle involved is elementary. In *Restatement of Torts,* Section 441, it is stated:

> (2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is

> liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actors' negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence.

The cases supporting this clause of the *Restatement* are legion. One of the most famous admiralty cases of this character is *The Mars,* (S.D. N.Y., 1914) 9 F. (2d) 183, a decision by Judge Learned Hand, who said of a similar case where the dominant cause was the superseding negligence of the party seeking to charge the other with liability:

> It may be thought that this was a proper case for dividing damages. * * * I think not. I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.
>
> That has been the rule in several admiralty cases.
>
> *The Egyptian* (1910), A. C. 400.

Compare, *The Redwood* (9th Cir., 1936), 81 F. (2d) 680, where this Court denied recovery for a total loss of a vessel injured in collision on the ground that the proximate cause of the loss was the attempt of the libelant to tow his boat to port rather than to beach her in safety.

We submit, therefore, that proper consideration of the evidence in these cases establishes beyond any question of doubt that the sole proximate cause of the accident was the negligence of Arrow in sending its employees to work in the hatch after it was aware both of the dangerous condition and of the fact that the ship's personnel did not expect the stevedores to expose themselves to the danger and did not intend to remedy the dangerous condition until a later time.

II.

APPELLEE ARROW IS LIABLE-OVER FOR THE AMOUNTS THE UNITED STATES IS REQUIRED TO PAY LIBELANTS.

Since Arrow's negligence in sending its men to work in the hatch with knowledge of the dangerous condition existing there was the proximate cause of the injury and damage resulting, the United States is entitled to recovery-over of the full amount it has been required to pay libelants. It was not required to await the result of the action and then to institute separate suits for recovery-over against Arrow, but was entitled to proceed by impleading Arrow in the suits brought by libelants. Even if it were possible to regard the United States as jointly at fault, still in admiralty

recovery-over of one-half of the amounts required to be paid out may be had. The indemnity provisions of the contract between Arrow and the United States did not deprive the Government of its right of recovery-over and expressly gave the Government the benefit of Arrow's compensation insurance in respect of any amounts of compensation which were paid libelants.

1. **The United States is entitled to recovery-over of the full amount of the judgments in favor of libelants.**

Arrow's contractual duty to the United States to stevedore the vessel in a proper and workmanlike manner was broken when the stevedores were permitted to work in the hatch, despite the knowledge of Arrow's foremen that the hatch cover was improperly secured. Since this negligent breach of duty to the United States was the sole proximate cause of the damage and injury, the United States is entitled to recover from Arrow the full amount which it may be required to pay as a result. The relationship established by the stevedoring contract made Arrow responsible for its failure to exercise care to protect its employees while aboard the *Edgecombe* and rendered it liable to the Government for the negligence of its foremen, even though the Government as shipowner is liable to libelants because of the breach of its nondelegable duty to furnish them a safe place to work. As described in the *Restatement of Restitution*, Section 95, the circumstances of such liability are as follows:

> Where a person has become liable with another for harm caused to a third person because of his

> negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.

This rule is supported by a number of cases at law.[5] In admiralty it has been applied by this Court in *Seaboard Stevedoring Corp. v. Sagadahoc SS Co.* (9th Cir., 1929), 32 F. (2d) 886, and *Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.* (9th Cir., 1926), 10 F. (2d) 769, 771. Cf. *The Lewis Luckenbach* (2nd Cir., 1913), 207 F. 66; *Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co.* (2nd Cir., 1922), 281 Fed. 97, 108, certiorari denied 259 U. S. 586; *Standard Oil Co. v. Robins Dry Dock & R. Co.* (2nd Cir., 1929), aff'g 25 F. (2d) 339; *Guy v. Donald* (4th Cir., 1907), 157 Fed. 527, 530.

The circumstances that structural defects, of which the stevedore knew or with reasonable inspection should have found, contributed to provide a situation in which the negligence of the stevedore's employees caused the accident does not affect the result. Thus in the *Seaboard* case, *supra,* a ship liable to a longshore-

---

[5]*Pfau v. Williamson,* 63 Ill. 16; *Chicago Railways Co. v. R. F. Conway Co.,* 219 Ill. App. 220; *Brooklyn v. Brooklyn City R. Co.,* 47 N.Y. 475; *Newell Bridge & Ry. Co. v. East Liverpool Traction & Light Co.,* 7 Ohio App. 241; *Minneapolis Mill Co. v. Wheeler,* 31 Minn. 121, 16 N.W. 698; *Interborough Rapid Transit Co. v. New York,* 237 App. Div. 612, 262 N.Y.S. 388, aff'd 262 N.Y. 612, 188 N.E. 88.

man because of the negligent way in which hatch covers were replaced and the unseaworthy condition of the king beam was held entitled to full indemnity from the stevedore contractor who replaced the hatch boards in a negligent manner so that the longshoreman was injured. In affirming a decree for the shipowner this Court said (p. 887):

> It is further suggested that appellee's officers, or some of them, were about the ship while she was discharging, but it is not contended that any one of them had knowledge that the board was improperly placed; indeed, the defense is that it was not so placed. We are aware of no rule under which the ship's officers should be required for appellant's benefit to exercise a high degree of vigilance to see that it performs a plain duty.

As this Court stated in *United States v. Wallace* (9th Cir., 1927), 18 F. (2d) 20, 21:

> In going on the ship to do the work, and in using its tackle, the contractor had to take them as it found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe.

So here, while the ship's personnel was aboard, unless they knew that Arrow's foremen, contrary to the agreement which had been previously reached, were working their men underneath the improperly secured hatch cover, they were not required to take special steps to see that the foremen performed Arrow's plain duty not to expose its men to the danger. *Standard Oil Co. v. Robins Dry Dock & R. Co., supra;*

The Susquehanna (E.D. N.Y., 1910), 176 Fed. 157, 158; cf. *Imbrovek v. Hamburg-American Steam Packet Co.* (D. Md., 1911), 190 Fed. 229, 232.

The United States is likewise entitled to full indemnity because such passive negligence as it might be guilty of in furnishing the hatch cover without a seaworthy and proper locking device was followed by the reckless conduct of Arrow's foremen Larsen and O'Shea, which was the proximate and dominant cause of the accident. That the conduct of Larsen and O'Shea in sending their men to work in the hatch without any inspection was dominant and proximate in causal effect and may properly be characterized as not merely negligent but reckless in the extreme appears clearly from their testimony (*supra*, pp. 13-15, 18-19). The conditions of such liability are described as follows in the *Restatement of Restitution*, Section 97:

> A person whose negligent conduct combined with the reckless or intentionally wrongful conduct of another has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tort-feasor could not have done so.

The rule thus stated is supported by various cases at law.[6] While no admiralty decision appears to have

---

[6] *Nashua Iron & Steel Co. v. Worcester Nashua R. Co.*, 62 N. H. 159; *Knippinberg v. Lord & Taylor Co.*, 193 App. Div. 753, 184 N.Y.S. 785; *Colonial Motor Coach Corp. v. New York Cen-*

passed upon the applicability of this rule, it is believed that the cases involving the contractual situation equally support its application. Cf. *Oceanic Steam Navigation Co. v. Cia. Transatlantique Espanola,* 134 N. Y. 461, 467.

That judgment was rendered against the United States in favor of the libelants does not establish as between the Government and Arrow that the latter may not be required to make the Government whole for any recovery awarded libelants. *George A. Fuller Co. v. Otis Elevator Co.* (1918), 245 U. S. 489; cf. *Washington Gas Light Co. v. District of Columbia* (1896), 161 U. S. 316, 327-328; *Fidelity & Casualty Co. v. Federal Express Co.* (6th Cir., 1938), 99 F. (2d) 681.

2. Even if fault on the part of the ship could be held to have contributed to the accident, the United States is entitled to partial recovery-over.

In the event that the Court should hold that the negligence of Arrow's foremen was not a supervening and dominant cause of the accident, but that the fault of the ship equally operated to cause the injury, the United States would still be entitled to a partial recovery-over under the federal maritime law.

The best formulation of the federal maritime law on the point is contained in the case of *The Tampico*

---

tral Ry. Co., 131 Misc. 891, 228 N.Y.S. 508; *Eastern Texas Elec. Co. v. Joiner* (Tex. Civ. App.), 27 S.W. 2d 917; cf. *Missouri, Kansas & Texas Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1; *Colorado & Southern Ry. Co. v. Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30; *Missouri, Kansas & Texas Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 Pac. 97.

(W.D. N.Y., 1942), 45 F. Supp. 174. There a longshoreman sued a barge owner for injuries caused jointly by the defective condition of the barge and the negligence of his fellow employees. Libelant was held entitled to recover the full amount of his damages from the barge owner and the barge owner, having been found equally at fault, was in turn allowed recovery-over to the extent of one-half against the libelant's employer. The Court said (pp. 175-176):

> The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. The Hamilton, 207 U.S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. "The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. [Citation.] Whatever its origin, the admiralty rule in this country is well known to be the other way. [Citations.] * * *". *Erie R. R. Co. v. Erie Transportation Co.,* 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution

> between wrongdoers does not stand on subrogation but arises directly from the tort. Erie R. R. Co. v. Erie Transportation Co., supra, 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libellant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasors. Briggs v. Day, D.C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. § 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See Aktieselskabet Cuzco v. The Sucarseco, et al., 294 U. S. 394, 400, 55 S. Ct. 467, 79 L. Ed. 942, and cases cited.

In collision cases the rule is of long standing that in a both-to-blame situation the recovery of personal injury claimants against either party is to be divided equally in the adjustment of the damage. See esp. *Brooklyn Eastern District Terminal v. United States,* (2d Cir., 1932), 54 F. (2d) 978, 980, reversed on an unrelated point 287 U. S. 170.

Again, *Barbarino v. Stanhope* (2nd Cir., 1945), 151 F. (2d) 553, reversed a District Court decree dismissing the petition impleading a stevedore in a case where a longshoreman was injured because of a defective bolt and the shipowner sought to hold the stevedore for the negligence of its foreman in permitting libelant to expose himself to the dangerous condition. There, unlike here, the defective condition was unknown by the stevedore's foreman, yet the Court rec-

ognized that liability-over would exist, for the Court said (p. 555):

> It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means.

In the instant case, as we have shown *supra,* the reckless conduct of Arrow's foremen did not merely contribute to the accident but, having regard to the agreement reached that Arrow's men would not work underneath the improperly secured hatch cover, amounted to such reckless conduct on the part of Arrow's employees as to constitute a supervening and dominant cause which entirely cut off the fault of the ship in failing to have a seaworthy and proper locking device on the hatch cover.

The immunity of Arrow from direct suit by libelants does not destroy the right of the United States to partial recovery-over any more than to total recovery-over. The law is settled in that sense as regards the effect of the New York Compensation Act. *Westchester Lighting Co. v. Westchester Small Estates Corp.,* 78 N.Y. 175, 179; 15 N.E. (2d) 567; *Burris v. American Chicle Co.* (2d Cir., 1941) 120 F. (2d) 218, 222. And with substantial unanimity the

District Courts have followed the same rule in respect of the Longshoremen's Act. *The SS Samovar* (N.D. Calif., 1947), 72 F. Supp. 574, 588; *Rederii v. Jarka Corp.* (D. Me., 1939), 26 F. Supp. 304, 305, app. dism. 110 F. (2d) 234; *Barbara v. S. Ransom, Inc.* (S.C.N.Y.), 1948 A.M.C. 1483, 1485, 79 N.Y. Supp. (2d) 438; *The Tampico, supra; Green v. War Shipping Administration* (E.D. N.Y., 1946), 66 F. Supp. 393; *Severn v. United States* (S.D. N.Y., 1946), 69 F. Supp. 21.

It would seem that there could be no doubt on the point. The Government's right of liability-over is not derivative but original. It does not depend on any right of libelants against the employer. *The Tampico, supra;* cf. *Erie R.R. Co. v. Erie & Western Transportation Co.,* (1912), 204 U.S. 220, 225-226. The situation is identical with that arising under the Harter Act where the owner of a seaworthy vessel is relieved of liability to its own cargo, but must respond to the claim for liability-over of another vessel in a "both to blame" collision situation. *The Chattahoochee* (1899), 173 U.S. 540; *Aktieselskabet Cuzco v. The Sucarseco* (1935), 294 U.S. 394. Compare the situation formerly resulting from the fellow servant rule (*Briggs v. Day* (S.D. N.Y., 1884), 21 Fed. 727, 730), and still resulting from the giving of a release (*Jones v. Waterman SS. Corp.* (3d Cir., 1946), 155 F. (2d) 992, 1001).

3. The contract did not deprive the United States of its right to recovery-over and expressly gave the Government the benefit of Arrow's compensation insurance.

Arrow has contended throughout these cases that it is relieved of all liability to the United States by reason of the indemnity clauses of the contract which provide:

> (b) The Contractor shall be liable to the Government for any loss or damage which may be sustained by the Government as a result of the negligence or wrongful acts or omissions of the Contractor's officers, agents or employees or through fault of its equipment or gear, subject, however, to the following limitations and conditions:
>
> * * * * * * *
>
> (2) The Contractor shall not be responsible to the United States for any loss or damage resulting from any act or omission of any employee of the Government * * * nor shall the Contractor be so responsible for any such loss or damage resulting from default of ships' or other gear supplied by the Government.

We believe, however, that the language of these clauses is plainly not designed to alter the result reached in their absence, but on the contrary, merely restates the rules of the federal maritime law.

It is obvious that the clauses refer only to cases involving the exclusive fault of the contractor or the Government, providing that where either is at fault he shall bear any loss or damage resulting. Applying the same principle, we submit that the clauses contemplate that if it should be found that

the fault of both the contractor and the Government contribute, the loss or damage resulting shall be divided in accordance with the rules prevailing in the absence of any contractual provision. Accordingly, we submit that if this Court shall hold that the reckless conduct of Arrow's foremen in sending its men to work in the hatch was the sole and proximate cause of the falling of the hatch cover and the resulting injuries, then Arrow is required under clause (b) to fully indemnify the United States. On the other hand, if it found that the negligence of the ship's personnel as well as that of Arrow's foremen contributed to cause the accident, then the loss or damage should be divided and the United States held entitled to recovery-over against Arrow for one-half of the amount recovered by libelants to their own use.

Nor can it be successfully maintained, as appears to have been thought by the Court below, that the unseaworthy condition of the locking device for securing the hatch cover is a default of "ships' or other gear supplied by the Government" within the meaning of clause (2). It is obvious from the context, no less than from general usage, that the expression "ships' gear" is employed in its ordinary meaning as referring to cargo-handling gear as provided for in clauses (H) and (I) of Article 1 of the contract, which make express provision as to ships' gear. These clauses provide that "The vessel to be loaded or discharged by Contractor shall be equipped with the usual and ordinary cargo-handling gear in proper operating condition," and state that "the expression 'usual gear and equipment' used herein is defined as any and

all gear and equipment (except fork lift trucks, pallet boards and cranes) ordinarily used and employed by Contractor in the San Francisco Bay area in the loading and discharging of cargo." It goes without saying that only the plainest of language should be allowed to operate to relieve Arrow of the liability to which it would otherwise be subject under the federal maritime law and against which it particularly undertook in the contract to insure. Any different interpretation would merely result in a windfall to the insurance carrier involved and that would clearly be the result here if the expression "ships' gear" is broadened to include parts of the ship, such as hatch covers and their fittings. Moreover, it seems plain that even if applicable, the clauses relating to defective gear are subject to an implied exception in cases like the present where the contractor is negligent in the use of the gear furnished by the Government.

The insurance aspect of the case is important not only in this connection but also in respect of the action of the Court below in permitting recovery against the United States of the amounts which libelants had already received at the hands of Arrow and its compensation underwriter. While it is only in the *Williams* case that the Court below went so far as expressly to declare a lien in favor of Arrow for the amount of $1,855.49 on account of such payments (Wms. R. 60), recovery was equally allowed libelant in the *Mitchell* case without deduction of the compensation payments amounting to $1,282.41 which had already been received (Mchl. R. 21) and no pro-

vision was made denying to Arrow a lien on the amount of such recovery. This is in clear violation of the clauses of the contract expressly providing that:

> (a) The Contractor shall procure and maintain at all times during the continuance of this agreement a policy or policies of insurance with underwriters to be approved by the Contracting Officer, insuring the Contractor against liability for injury to or death of any person or persons to an amount not less than $250,000.00.
>
> * * * * * * *
>
> (4) Notwithstanding any other provision of this contract, the Contractor agrees to waive any right of reimbursement for loss or damage of any kind or character which it may have against the Government under any provision of this agreement if said loss or damage is covered by insurance and Contractor has collected or may collect for said loss or damage from the insurance company. The Contractor further agrees to have attached to and made a part of all insurance policies issued pursuant to this agreement on operations thereunder a rider by the terms of which the insurance company agrees to waive any and all rights of subrogation which it may have against the United States by reason of any payment under said policy.

These provisions clearly apply in the situation prevailing here and prevent any indirect recovery by Arrow, through the device of a lien, of those parts of the judgments recovered by libelants to which Arrow and not the libelants is beneficially entitled. Accordingly, since these amounts have already been in-

cluded in the judgments in favor of libelants, they must also be awarded to the United States by way of recovery-over against Arrow.

We submit, therefore, that the United States is entitled to recovery-over against Arrow of the full amount of the decrees in favor of libelants. But even if it should be held that the fault of the ship's personnel contributed equally to the accident, still, we believe, the United States is entitled to recovery-over against Arrow of the amounts of the compensation payments plus one-half of the balance of the decrees awarded libelants in the Court below.

CONCLUSION.

For the foregoing reasons we submit that the decision of the Court below should be reversed and the United States awarded a decree for recovery-over against appellee Arrow Stevedoring Company.

Dated, November 12, 1948.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

LEAVENWORTH COLBY,

KEITH R. FERGUSON,
Special Assistants to the Attorney General,

WILLIAM E. LICKING,
Assistant United States Attorney,

Attorneys for the United States.